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Case No. 89-478

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF AMICUS CURIAE*

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*The States joining in this brief are listed in Appendix A of this brief.

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QUESTION PRESENTED

WHERE CASE-SPECIFIC FINDINGS REGARDING THE NEED TO PROTECT CHILD VICTIMS ARE MADE AND THE WITNESSES, AGES FOUR TO SIX, ARE SUBJECTED TO CROSS-EXAMINATION AT TRIAL, DOES THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE REQUIRE A FACE-TO-FACE MEETING BETWEEN THE WITNESSES AND THE ACCUSED BEFORE A ONE-WAY CLOSED-CIRCUIT TELEVISION PROCEDURE IS USED?

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INTEREST OF AMICUS CURIAE

The State of Florida, as amicus curiae (along with those states and jurisdictions joining in this brief*), expresses deep concern with the decision of the Court of Appeals of Maryland. Unless the United States Supreme Court overturns this decision, it could have a detrimental effect nationwide on statutes designed to both elicit truthful testimony from the victims of child sexual abuse, and to minimize the trauma associated with testifying in court.

At present, thirty states have enacted laws providing for closed-circuit televised testimony of child victims or witnesses in lieu of testimony in the courtroom. The Maryland statute at issue here is characteristic of this national trend reflecting greater awareness of the unique and difficult position of abused children who must be witnesses in criminal prosecutions. Rejection of Maryland's procedure for protecting child victims of abuse will weaken national efforts aimed at successfully prosecuting these crimes against society's most helpless victims.

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* The States and jurisdictions joining this brief are listed infra in Appendix A.

The various state laws or rules providing for the use of closed-circuit televised testimony of child victims are listed infra in Appendix B.

ARGUMENT

The Amicus States agree with Petitioner Maryland that the protection of child abuse victims is an issue of great public importance, and that the decision below represents an erosion of that protection.

Child sexual abuse has grown to extraordinary proportions in recent years. Studies indicate that during childhood approximately 20% of all females and 10% of all males are sexually molested by an adult.[1] Sexual abuse cases are exceptionally difficult to prosecute because the child victim is usually the only witness to the crime.[2]

Under traditional court procedures, the child may be found incompetent to testify, or upon testifying may be unable to recall crucial details or relate them to the jury.[3] For example, children are often reluctant witnesses and sometimes retract prior testimony to absolve an assailant who is a family member.[4]

Child therapists maintain that children often fall apart or retract their accusations on the witness stand because they are frightened by the defendants.[5] Parents sometimes decline to press charges rather than subject their abused children to litigation requiring repetition of a traumatic episode.[6]

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1 D. Finkelhor, *Sexually Victimized Children* 53 (1979).

2 Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim.Just.J.1 (1983).

3 *See*, A. Yarney, *The Psychologyee of Eyewitness Testimony* 204-5 (1979).

4 D. Finkelhor, *Child Sexual Abuse* 2-3 (1984).

5 *Closed-Circuit Television Testimony for The Sexually Abused Child: The Right to Avoid Confrontation*, 27 Santa Clara L. Rev. 117 (1987).

6 Note, *The Testimony of Child Victims in Sex Abuse Prosecution: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 807 (1985).

> The significant conflicts among the interests of the state, the defendant and the victim come into sharpest focus in child sexual abuse cases. The only eyewitness is usually a child of tender years who has been betrayed by a powerful, trusted adult. Asking such a witness to understand, not to be afraid, and to respond in a courtroom as a mature adult is asking too much in most cases. For this reason, many charges will never be prosecuted.[7]

Several researchers have determined that traditional court procedures add to a child's psychological scars, producing "system-induced trauma."[8] Additionally, empirical research suggests that physical confrontation with the defendant may even damage the reliability, quality, and often the very existence of the child's testimony.[9] The child can become so intimidated by the presence of the defendant that he or she cannot speak about the incident.[10]

In *State v. Sheppard*, the Superior Court of New Jersey noted:

> An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of a black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious

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7 Weisberg, *Sexual Abuse of Children: Recent Developments in the Law of Evidence*, Children's Legal Rts.J., Fall 1984, at 12.

8 Colby & Colby, *Videotaped Interviews in Child Sexual Abuse Cases: The Texas Example*, 66 Child Welfare 25 (1987); Conte, *The Justice System and Sexual Abuse of Children*, 58 Social Serv. Rev. 556-568 (1984); Libai, *Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 982 (1969).

9 Hill & Hill, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev., 809 note 21 at 820 (1987).

10 *Id.* at 827.

> overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony.[11]

Heightened media attention has increased the public's awareness of the problem of child sexual abuse.[12] This awareness has resulted in an increase in reported cases which has led to a major law reform movement to better handle those cases coming into the criminal justice system.[13] One important evidentiary innovation aimed at protecting child sexual abuse victims from further trauma is the enactment of laws providing for the taking of the child victim's testimony via closed-circuit television.

The American Bar Association recommends that "(w)hen necessary, the child should be permitted to testify from a location other than that normally reserved for witnesses

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11 *State v. Sheppard*, 197 N.J. Super. 411, 416, 484 A.2d 1330, 1332 (1984).

12 Bulkley, *Introduction: Background and Overview of Child Sexual Abuse*, 40 U. Miami L. Rev. 5, 6, (1985).

13 *Id.*

who testify in the particular courtroom,"[14] and "(w)hen necessary, the child should be permitted to testify via closed-circuit television . . . so long as the defendant's right to cross-examine is not impaired."[15]

CLOSED CIRCUIT TELEVISION STATUTES

At present, thirty states have enacted provisions allowing closed-circuit televised testimony at trial where abuse of a child is alleged.[16] These laws provide guidelines for trial judges to use in determining whether the child will suffer trauma as a result of testifying in the courtroom or in the defendant's presence, or whether the child's trauma will prevent the child from testifying truthfully or even testifying at all.

It must be stressed here that a primary interest and *raison d'etre* of these provisions is to assure the integrity of the fact-finding process.[17] In drafting the various provisions, state legislatures took into consideration the need to strike a balance between society's interest in justice and protection of its child victims and, on the other hand, the constitutional rights of criminal defendants. Of such efforts one commentator has written:

> Society has a substantial and compelling need to protect child sexual abuse victims from further psychological and emotional harm. Society also has a compelling need to preserve the rights of defendants. These two needs, however, are not

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14 *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged*, 110 Annual Report of the American Bar Association 943 (1985).

15 *Id.*

16 *See* , Appendix B, *infra*.

17 *See, e.g.*, Chapter 85-53, Laws of Florida.

> mutually exclusive. They must be balanced against each other, and their respective weights determined. Indeed, since [testimony via closed-circuit television] can be used without any substantial infringement of a defendant's rights and because the need to protect the victimized child witness is overwhelming, the scale must tip towards the child.[18]

The statement contained in California Penal Code § 1347(a) (1987), is representative of this legislative purpose:

> It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.

The various state enactments authorizing the use of televised testimony are procedurally similar. The child witness is normally removed to a suitable setting outside the courtroom. The only other parties typically present with the child are the prosecutor, defense counsel, the camera personnel, and a person whose presence would contribute to the welfare and well-being of the child.[19] The statute may also provide that the support person shall not coach, cue, or influence the child's testimony.[20]

The jury and the defendant remain in the courtroom. When testimony is transmitted to the courtroom via simultaneous electronic means, the statutes may require that the trial court ensure that the courtroom is equipped with monitors that permit the jury, the defendant, and all others present to see and hear the transmission;[21] that the transmission is in color;[22] that the child is visible on the monitor at all times;[23] that every voice transmitted is audible and identified;[24] that the transmission is not altered in any way.[25]

Most importantly, to satisfy the confrontation clause concern of effective cross-examination, the procedure must allow the defendant to be in constant communication with

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18 Comment, *The Use of Closed-Circuit Television Testimony in Child Sexual Abuse Cases: A Twentieth Century Solution to a Twentieth Century Problem*, 23 San Diego L. Rev. 919 938 (1986).

19 *See, e.g.*, Alaska Stat. Supp. § 12.45.046(c)(C)(2) (1988); Cal. Penal Code § 1347(f) (1989); Fla. Stat. § 92.54(3) (1989); Ga. Code Ann. § 17-8-55 (1989); Ind Code Ann. § 35-37-4-8(e)(2) (1989); Md. Cts. & Jud. Proc. Code Ann. § 9.102(b)(1)(iv)(1989); Minn. Stat. Ann. § 595.02(b) (1988); Tex. Crim. Proc. Code Ann. Art. 38.071 Sec. 3(a) (1989); R.I. Gen. Laws § 11-37-13.1 (1988); Utah Code Ann. § 77-35-15-5(2)(a) (1989); Vt. R. Evid. 807(d); Va. Code § 18.2-67.8(c) (1988).

20 *See, e.g.*, Cal. Penal Code § 1347(d)(4) (1989).

21 *See, e.g.*, Cal. Penal Code § 1347(b) (1989); Mass. Gen. Laws, Ann. Ch. 278:16D(b)(7)(d) (1989).

22 *See, e.g.*, Mass. Gen. Laws Ann. Ch. 278:16D(b)(7)(b).

23 *See, e.g., id.*

24 *See, e.g.*, Ariz.Rev.Stat.Ann. § 13-4253(B)(3) (1988); Kan.Stat.Ann. § 38-1558(a)(2)(C) (1988).

25 *See, e.g.*, Ariz.Rev.Stat.Ann. § 13-4253(B)(3) (1988); Kan.Stat.Ann. § 38-1558(a)(2)(B) (1988); Ohio Rev.Code Ann. § 2907.41(D) (1987).

his attorney during the child's testimony. This is usually accomplished through a private telephone line or other means of constant private communication.[26] Thus the defendant's opportunity for cross-examination is not impaired.[27]

Some states also provide for two-way closed circuit televised testimony.[28] Not only is the child's image broadcast into the courtroom, but the image of the defendant is also transmitted to a monitor in full view of the child.

Contemporaneous televised testimony adheres closely to the giving of testimony in the traditional courtroom setting, except that the child is not in the physical presence of the defendant. Televised testimony is thus the functional equivalent of testimony within the courtroom.[29]

The majority of closed-circuit statutes contemplate only the testimony of child victims, but some allow the testimony of other children who are witnesses to the abuse.[30]

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26 *See, e.g.*, Fla. Stat. § 92.54(4) (1989); Mass. Gen. Laws Ann. Ch. 278:16D(b)(5) (1989); Md. Cts. & Jud. Proc. Code Ann. § 9-102(b)(3) (1989); Miss. Code Ann. § 13-1-405(4) (1987); N.J. Stat. Ann. 2A:84A-32.4(d) (1989).

27 *See, e.g., State v. Vess*, 157 Ariz. 236, 756 P.2d 333 (Ariz. App. 1988); *People v. Algarin*, 129 Misc.2d 1016, 498 NYS 2d 977 (1986).

28 *See, e.g.*, Cal. Penal Code § 1347 (1989); Haw. R. Evid. 616.; Idaho Code § 19-30204A (1989); N.Y. Crim. Proc. Law §§ 65.00-.30 (1989); Ohio Rev. Code Ann. § 2907.41 (1987); Vt. R. Evid. 807; Va. Code § 18.2 - 67.8 (1988).

29 *See, e.g., Commonwealth v. Willis*, 716 S.W.2d 224, 228 (Ky. 1986); *State v. Jarzbek*, 204 Conn. 683, 696-97, 529 A.2d 1245, 1252 (1987), *cert. denied*, ___ US ___, 108 S.Ct. 1017 (1988).

30 *See, e.g.*, Ala. Code § 15-25-3 (1988); Ariz. Rev. Stat. Ann. § 13-4253 (1988); Alaska Stat. § 12.45.046 (1988); Fla. Stat. § 92.54 (1989); Mass. Gen. Laws Ann. Ch. 278 § 16D (1989); N.J. Stat. Ann. § 2A:84A-32.4 (1989); Pa. Cons. Stat. Ann. tit. 42 § 5985 (1989); Utah Code Ann. § 77-35-15.5 (1989).

The states vary as to the age qualifications of the child witnesses. Some statutes require that the child be ten years old or less[31] while others require that the child be seventeen years old or less.[32]

The standards which the trial courts must satisfy and the findings they must make in order to take a child's testimony via closed-circuit television also vary. Some statutes mention no standards at all.[33] Others require only that testimony be televised "for good cause shown,"[34] or "when justice so requires,"[35] or when "it is in the best interest of the child."[36]

The majority of closed-circuit statutes set forth more detailed standards or factors for the trial court to consider. Most require that the court determine whether the child will suffer mental or emotional trauma if required to testify either in the courtroom or in the presence of the defendant or both.

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31 *See, e.g.*, Cal. Penal Code § 1347 (1989); Ind. Code Ann. § 35-37-4-8 (1989); Minn. Stat. Ann. § 595.02 (1988).

32 *See, e.g.*, Ala. Code 15-25-3 (1988); Fla. Stat. § 92.54 (1989); Haw. R. Evid. 616; Md. Fam. Law Code Ann. § 5-701(d) (1989 Supp.); N.J. Stat. Ann. 2A:84A-32.4 (1989). Rhode Island is an exception. R.I. Gen. Laws § 11-37-13.2 (1988) requires that the child be seventeen years of age or less at time of trial, there is a rebuttable presumption that the child is unable to testify before the court without suffering "unreasonable and unnecessary mental or emotional harm".

33 *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-4253 (1988); Haw. R. Evid. 616; Iowa Code § 910A.14 (1989); Kan. Stat. Ann. § 22-3434 (1988); Ky. Rev. Stat. Ann. § 421.350 (1989); Okla. Stat. Ann. tit. 22 § 753 (1989). Where no standards are articulated by the legislature, the courts in some states have stepped in to fill the gap. *See, e.g., State v. Draper*, ___ Ariz. ___, 784 P.2d 259 (Dec. 6, 1989); *State v. Eaton*, 244 Kan. 376, 769 P.2d 1157 (1989); *Commonwealth v. Willis*, 716 S.W 2d 244 (Ky. 1986).

34 Ala. Code § 15-25-3 (1988); Pa. Cons. Stat. Ann. tit. 42 § 5985 (1989).

35 La. Rev. Stat. Ann. § 15:283 (1989).

36 Ill. Ann. Stat. Ch. 38 § 106A-3 (1989).

Massachusetts Gen. Laws Ann. Ch. 278:16D(b)(1) (1989) requires that the court find by a preponderance of the evidence that the child witness is "likely to suffer psychological or emotional trauma" as a result of testifying in open court, in the presence of the defendant, or both.

Indiana Code Ann. § 35-37-4-8 (d)(1)(C) (1989) requires that the court find that "it is more likely than not that the child's testifying in the courtroom would be a traumatic experience," based on evidence which may include a psychiatrist's certification of resultant trauma.

Minnesota Stat. Ann. § 595.02(4)(c) (1988) requires that the court determine that the presence of the defendant during testimony would "psychologically traumatize the witness so as to render the witness unavailable to testify."

Florida Stat. § 92.54(1) (1989) requires that the court hold a hearing in camera to determine whether "there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court". Specific findings of fact on the record are also required.

Alaska Stat. § 12.45.046(a)-(b) (1988) requires that the court make a determination that testimony under normal court procedures "would result in the child's inability to effectively communicate," and lists factors to consider including the child's age, development, health, physical, emotional, or psychological injury, and mental or emotional strain that will be caused by in-court testimony.

Connecticut Public Act No. 89-177 amended Conn. Gen. Stat. Ann. § 54-86g (1989) to provide that the defendant may be excluded from the sight and hearing of the child only if the state proves "by clear and convincing evidence that the child would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that a compelling need

exists to take the testimony of the child outside the physical presence of the defendant in order to insure the reliability of such testimony."

California Penal Code § 1347 (1989) permits closed-circuit testimony if the child's testimony will involve recitation of the facts of an alleged sexual offense committed on or with the child, and the impact on the child of one or more of a listed series of factors is "shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used." These factors include threats to the child or a family member, use of a weapon during the incident, injury to the victim, or conduct on the part of the defendant or defense counsel which causes the minor to be unable to continue his or her testimony. The court may question the child out of the defendant's presence and must make a statement on the record in support of its order.

Vermont R. Evid. 807(c) requires that the court make a finding that "requiring the child to testify in court will present a substantial risk of trauma to the child which would substantially impair the ability of the child to testify."

New York Crim. Proc. Law § 65.10 (1989) requires that the court determine by clear and convincing evidence that "it is likely, as a result of extraordinary circumstances, that such child witness will suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the

use of such live, two-way closed-circuit television will help prevent, or diminish the likelihood or extent of, such harm."[37]

In order to find the existence of "extraordinary circumstances," a New York trial judge may consider whether any of twelve enumerated factors apply.[38] The court shall make findings of fact supporting a finding of the child's vulnerability and may enter an order permitting closed-circuit testimony if "under the facts and circumstances of the particular case, the defendant's constitutional rights to an impartial jury or of confrontation will not be impaired . . . ."[39] The court shall make a finding as to whether the defendant's presence will contribute to the likelihood that the child will suffer severe mental or emotional harm.[40]

New Jersey Stat. Ann. § 2A:84A-32.4(b) (1989) requires that the trial court find that there is "a substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court." The order must specify who will be excluded from the child's physical presence and "shall be based on specific findings relating to the impact of the presence of each."

Georgia Code Ann. § 17-8-55 permits closed-circuit testimony only if the court finds that "there is a substantial likelihood that such child will suffer severe emotional or

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37 The New York Legislature enacted this procedure on an experimental basis in 1985 for three years, and extended it for a second three year period to expire November 1, 1991. N.Y. Crim. Proc. Law § 65.00 (1989). The State of New York Court of Appeals has held Article 65 to be facially constitutional. *People v. Cintron*, ___ N.Y.2d ___, ___ N.E.2d ___ (decided January 11, 1990).

38 N.Y. Crim. Proc. Law. § 65.20(9) (1989) (these factors are listed *infra* in Appendix C).

39 § 65.20(11).

40 § 65.20(12).

mental distress if required to testify in open court," and "the rights of the defendant will not be unduly prejudiced."

Maryland Cts. & Jud. Proc. Ann. § 9-102 (1989), the statute before this Court, requires that the judge determine that the child's testimony in the courtroom will result in the child suffering "serious emotional distress such that the child cannot reasonably communicate."

Ohio Rev. Code Ann. § 2907.41 (1987) authorizes a judge to order closed-circuit testimony if the judge determines that the child is "unavailable" to testify in the defendant's presence if one or more factors are present. Those factors include the child's persistent refusal to testify despite the judge's request, inability to tell about the alleged violation because of extreme fear, failure of memory, or other similar reason, and/or the substantial likelihood that the child will suffer "serious emotional trauma from so testifying." The judge must enter his determination and findings on the record.

Virginia Code § 18.2-67.8 (1988) authorizes a trial court to take a child victim's testimony by closed-circuit television if it finds that the child is "unavailable" to testify in open court if the child persistently refuses to testify despite judicial requests, or the child is substantially unable to communicate about the offense, or there is a substantial likelihood, based on expert testimony, that the child "will suffer severe emotional trauma from so testifying." The court's ruling on unavailability must be supported by findings on the record.

Although the stated standards of the various states may differ somewhat, it is clear that the objectives and concerns are the same. It is important for this Court to note that before a child victim is excluded from testifying in the presence of the jury and the accused on the premise that the child is suffering or will suffer additional injury, the basis

for such a premise is established both in fact as well as logic pursuant to a trial judge's reasoned determination.

Amicus Curiae and the states and jurisdictions joining this brief submit that the use of closed-circuit televised testimony in lieu of testimony in the courtroom affords a defendant the primary protections envisioned by the confrontation clause of the Sixth Amendment to the United States Constitution. *See Commonwealth v. Willis, infra.*

Even in the case of a state constitution that specifically states that the accused has the right "to meet the witnesses *face to face,*"[41] (emphasis supplied), at least one court has held that a statute allowing the closed-circuit televised testimony of a child victim satisfies that constitutional requirement. In *Commonwealth v. Willis,* the Supreme Court of Kentucky demonstrated how these interests can be reconciled:

> The sections of the statute apply only to a narrow class of witnesses, children twelve years old or younger who are victims of sex offenses. They impose no restrictions on cross-examination; allow the finder of fact to observe the demeanor of the witness and require that defendant be present to see and hear the testimony. The law is available at the discretion of the trial judge in the interest of the truth determining process. The appropriate balancing of the competing interests of the right of confrontation and the right of a witness to be free of intimidation favors the constitutionality of the statute. *See Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).[42]

41 *See, e.g.,* Kentucky Constitution, § 11.

42 *Commonwealth v. Willis, supra* at 227, 228. *But see Commonwealth v. Bergstrom,* 402 Mass. 534, 524 N.E.2d 366 (1988) (State Constitution affords specific right to direct confrontation).

The Kentucky Supreme Court further recognized that there is no constitutional right to "eyeball to eyeball" confrontation,[43] and that the choice of the words "face to face" were a possible result of "an inability to foresee technological developments permitting cross-examination and confrontation without physical presence."[44] The court went on to state:

> The use of video or television equipment as a substitute for personal appearance, either in trial or in deposition, requires the Commonwealth to demonstrate that such use is reasonably necessary and to provide the technical details whereby the testimony will be taken with the child screened from the sight and hearing of the accused, while at the same time, the defendant can view and hear the child and maintain continuous audio contact with his defense counsel. Consequently, the only incursion on the defendant's right of confrontation is that the child is not required to look at the defendant's face or listen to his comments.
>
> There is no authority under traditional court room procedures which specifically requires any witness to look at the defendant. A witness has never been disqualified by mere refusal or inability to look at the defendant. The testimony of a blind victim would not be invalid. The same is true for the testimony of a witness who refuses to look on the accused. By analogy a defendant would not be denied the right of confrontation when a young victim is so intimidated by his mere presence that

43 *Id.* at 230.

44 *Id.*

> she cannot testify unless she is unable to see or hear him.
>
> The strength of the State and Federal Constitutions lies in the fact that they are flexible documents which are able to grow and develop as our society progresses. The purpose of any criminal or civil proceeding is to determine the truth. KRS 421.350 provides such a statutory plan while protecting the fundamental interests of the accused as well as the victim.[45]

Amicus Curiae and the states and jurisdictions joining this brief strongly urge this Court to reverse the ruling of the Maryland Court of Appeals as that court overextended Confrontation Clause precepts without giving due weight to the compelling public interest of protecting child sex abuse victims. An adequate showing of the probability of emotional or mental trauma can be made without requiring the presence of the defendant at the pretrial hearing by using expert psychological evaluation and testimony as well as personal observation of the victim by the trial judge.[46]

Closed-circuit statutes which require case-specific determinations of necessity accomplish the constitutional task of affording the defendant his right of confrontation while also protecting the rights of children. The ruling of the Maryland court of appeals creates conflict between Maryland and the plurality in *Coy v. Iowa*[47] and the other state decisions discussed by Petitioner in its brief. The result is the imposition of an unrealistic procedure which will result in further harm to child sex abuse victims without contributing to a

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45 *Id.* at 231.

46 *See, The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child,* 42 U. Miami L. Rev. 1033 (1988).

47 487 US ____, 108 S.Ct. 2798 (1988).

criminal defendant's Sixth Amendment right to confrontation.

CONCLUSION

Amicus Curiae and the states and jurisdictions joining this brief respectfully urge this Honorable Court to reverse the ruling of the Court of Appeals of Maryland in the case sub judice.

Respectfully submitted,

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Case No. 89-478

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF AMICUS CURIAE*

APPENDIX

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APPENDIX A

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APPENDIX B

PROVISIONS ALLOWING FOR USE OF ONE-WAY CLOSED-CIRCUIT TELEVISION

Alabama: Ala. Code § 15-25-3 (Supp. 1988).

Alaska: Alaska Stat. § 12.45.046 (Supp. 1988).

Arizona: Ariz. Rev. Stat. Ann. § 13-4253 (Supp. 1988).

Connecticut: Conn. Gen. Stat. Ann. § 54-86g (West Supp. 1989) (amended by Conn. Public Act 89-177 (1989).

Florida: Fla. Stat. § 92.54 (West Supp. 1989).

Georgia: Ga. Code Ann. § 17-8-55 (Supp. 1989).

Illinois: Ill. Ann. Stat. ch. 38, para. 106A-3 (Smith-Hurd Supp. 1989).

Indiana: Ind. Code Ann. § 35-37-4-8 (Burns Supp. 1989).

Iowa: Iowa Code Ann. § 910A.14 (West Supp. 1989).

Kansas: Kan. Stat. Ann. § 22-3434 (1988).

Kentucky: Ky. Rev. Stat. Ann. § 421.350 (Baldwin Supp. 1989).

Louisiana: La. Rev. Stat. Ann. § 15:283 (West Supp. 1989).

Maryland: Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1987).

Massachusetts: Mass. Gen. Laws Ann. ch. 278, § 16D (West Supp. 1989).

Michigan: Mich. Comp. Laws § 600.2163a (1989).

Minnesota: Minn. Stat. Ann. § 595.02 (West 1988).

New Jersey: N.J. Stat. Ann. § 2A:84A-32.4 (West Supp. 1989).

Oklahoma: Okla. Stat. Ann. tit. 22, § 753 (West Supp. 1989).

Pennsylvania: Pa. Cons. Stat. Ann. tit. 42, § 5985 (Purdon Supp. 1989).

Rhode Island: R.I. Gen. Laws § 11-37-13.2 (Supp. 1988).

Texas: Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989).

Utah: Utah Code Ann. § 77-35-15.5 (Supp. 1989).

Vermont: Vt. R. Evid. 807.

PROVISIONS ALLOWING FOR USE OF TWO-WAY CLOSED-CIRCUIT TELEVISION

California: Cal. Penal Code § 1347 (West Supp. 1989).

Hawaii: Haw. R. Evid. 616.

Idaho: Idaho Code § 19-30204A (1989).

Minnesota: Minn. Stat. Ann. § 595.02(4)(c)(2) (West 1988).

New York: N.Y. Crim. Proc. Law §§ 65.00-.30 (McKinney Supp. 1989).

Ohio: Ohio Rev. Code Ann. § 2907.41 (Page 1987).

Vermont: Vt. R. Evid. 807.

Virginia: Va. Code § 18.2-67.8 (1988).

APPENDIX C

New York Criminal Procedure Law § 65.20(9) (1989)

9. The court may consider, in determining whether there are such extraordinary circumstances as would cause the child witness to suffer severe mental or emotional harm, a finding that any one or more of the following factors have been established by clear and convincing evidence:

(a) The manner of the commission of the offense of which the defendant is accused was particularly heinous or was characterized by aggravating circumstances.

(b) The child witness is particularly young or otherwise particularly subject to psychological harm on account of a physical or mental condition which existed before the alleged commission of the offense.

(c) At the time of the alleged offense, the defendant occupied a position of authority with respect to the child witness.

(d) The offense of offenses charged were part of an ongoing course of conduct committed by the defendant against the child witness over an extended period of time.

(e) A deadly weapon or dangerous instrument was allegedly used during the commission of the crime.

(f) The defendant has inflicted serious physical injury upon the child witness.

(g) A threat, express or implied, of physical violence to the child witness or a third person if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grant jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(h) A threat, express or implied, of the incarceration of a parent or guardian of the child witness, the removal of the child witness from the family or the dissolution of the family of the child witness if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grant jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(i) A witness other than the child witness has received a threat of physical violence directed at such witness or to a third person by or on behalf of the defendant.

(j) The defendant, at the time of the inquiry, (i) is living in the same household with the child witness, (ii) has ready access to the child witness or (iii) is providing substantial financial support for the child witness.

(k) The child witness has previously been the victim of an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25 of such law.

(l) According to expert testimony, the child witness would be particularly susceptible to psychological harm if required to testify in open court or in the physical presence of the defendant.